Supreme Court, U.S.
FILED
JUN 14 1993
OFFICE OF THE CLERK

No. 92-1180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE RESPONDENT

RICHARD J. TROBERMAN*
E. E. EDWARDS, III
1301 Fifth Avenue, Suite 3500
Seattle, Washington 98101-2650
(206) 343-1111

* Counsel of Record for
Amicus Curiae
National Association of
Criminal Defense Lawyers

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

28 pp

QUESTION PRESENTED FOR REVIEW

Whether the seizure of real property in a civil *in rem* forfeiture proceeding, without notice to the owner and an opportunity to be heard prior to the seizure, violates the Due Process Clause of the Fifth Amendment.

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE RESPONDENT

INTEREST OF THE AMICUS

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 7,000 attorneys and 28,000 affiliate members, including representatives from every state. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in its House of Delegates.

The NACDL was founded over thirty-five years ago to promote study and research in the field of criminal defense law; to disseminate and to advance knowledge of the law in the field of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers. Among the

NACDL's stated objectives is the promotion of the proper administration of criminal justice.

The NACDL has long been troubled by the ever expanding use of civil forfeiture proceedings in our criminal justice system. We have deep concerns about the fairness and wisdom of some of these laws and the aggressive way they are being used by federal and state prosecutors to inflict punishment and to deprive individuals of significant property interests without any of the constitutional and procedural protections generally accorded to either criminal or civil defendants. Like the Second Circuit Court of Appeals, we too "continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." *United States v. All Assets of Statewide Auto Parts, Inc.*, etc., 971 F.2d 896, 905 (2nd Cir. 1992).

Although an overwhelming majority of courts to have considered the issue have held that due process requires notice and an opportunity to be heard prior to the seizure of real property in the context of an *in rem* civil forfeiture proceeding, there remains a conflict among the circuits on this issue of recurring importance. Thus, the NACDL has a vital interest in the outcome of this case, and urges the Court to affirm the decision below.[1]

SUMMARY OF ARGUMENT

The Fifth Amendment Due Process Clause requires notice and an opportunity to be heard prior to the deprivation of any significant property right. Interests in real property, especially the home, have traditionally been afforded heightened constitutional protections.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

This Court has repeatedly held that only an extraordinary situation involving the need for very prompt action can justify postponement of notice and opportunity to be heard. In the case of real property, the need for such prompt action will rarely, if ever, be present because real property, unlike currency, conveyances, and other personal property, cannot be concealed, or removed from the jurisdiction of the court.

Applying the three prong test for due process analysis announced by this Court in *Mathews v. Eldridge*, 424 US 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976), the government's interest in seizing real property without notice and an opportunity for the owner to be heard is less compelling than the owner's interest in avoiding an erroneous deprivation of property. On balance, notice and an adversarial hearing is constitutionally required prior to the seizure of real property.

ARGUMENT

I. DUE PROCESS REQUIRES NOTICE AND AN OPPORTUNITY TO BE HEARD PRIOR TO THE DEPRIVATION OF ANY SIGNIFICANT PROPERTY INTEREST.

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge*, 424 US 319, 332, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976).[2]

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[2] Although Petitioner argues that the Fourth Amendment applies to the exclusion of the Fifth Amendment in civil forfeiture proceedings, Petitioner has not offered a single authority embracing, or even considering, this unique premise. On the contrary, this Court has previously held, under a due process analysis, that only extraordinary circumstances can justify the failure to provide preseizure notice and hearing in the context of a civil forfeiture proceeding. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 677-80, fn. 14, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974). The Court in *Calero-Toledo* did not address the question of whether the Fourth Amendment was

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 68 U.S. 223, 233, 17 L.Ed. 531, 534. *See, Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914; *Hovey v. Elliott*, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841; *Grannis v. Ordean*, 234 U.S. 385, 58 L.Ed. 1363, 34 S.Ct. 779. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L.Ed.2d 62, 66, 85 S.Ct. 1187.

Fuentes v. Shevin, 407 U.S. 67, 80-81, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972).

The right to a hearing prior to the deprivation of any significant property interest has long been recognized by this Court. Id., 407 U.S. at 82. Although the Court has held that due process tolerates variances in the form of a hearing "appropriate to the nature of the case," *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313, 94 L.Ed.2d 865, 872, 70 S.Ct. 652 (1950), and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," *Boddie v. Connecticut*, 401 U.S. 371, 378, 28 L.Ed.2d 113, 119, 91 S.Ct. 780, the Court has traditionally insisted that, whatever its form, opportunity for that hearing be provided *before* the deprivation at issue takes effect. *See, e.g., Bell v. Burson*, 402 U.S. 535, 542, 29 L.Ed.2d 90, 96, 91 S.Ct. 1586 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 27 L.Ed.2d 515, 519, 91 S.Ct. 507 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1111 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S.

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even applicable, let alone the exclusive source of constitutional protection in civil forfeiture seizures. *See*, discussion, *infra*, at pp. 6-10.

337, 339, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969); *Armstrong v. Manzo*, supra, 380 U.S. at 551, 14 L.Ed.2d. at 66; *Mullane v. Central Hanover Trust Co., supra*, 339 U.S. at 313, 94 L.Ed. at 872.

> "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.

Fuentes, supra, 407 U.S. at 82, 32 L.Ed.2d at 571 (emphasis in original). "In short, 'within the limits of practicability' a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie v. Connecticut, supra*, at 378-379, 28 L.Ed. 2d at 119.

Fuentes holds that such extraordinary situations "must be truly unusual," and justify postponement of notice and an opportunity to be heard only where each of the following three elements are present: (1) the seizure is directly necessary to secure an important governmental or public interest; (2) there has been a special need for very prompt action; and (3) the seizure was initiated by a governmental official responsible for determining, under the standards of a narrowly drawn statute, that the seizure was necessary and justified. 407 U.S. at 91.

To the extent that there could have been any doubt after *Fuentes* that only an extraordinary situation involving the need for prompt action can justify postponement of notice and an opportunity to be heard, such doubt was put to rest by this Court in *Connecticut v. Doehr*, 501 U.S. ___, 115 L.Ed.2d 1, 111 S.Ct. 2105 (1991). In *Doehr*, a private individual sought to attach Doehr's home pursuant to the Connecticut attachment statute. An application to attach Doehr's home, supported by an af-

fidavit, was submitted to a superior court judge in an *ex parte* proceeding. The judge, on the basis of the affidavit, found probable cause and ordered the attachment.

This Court held that the Connecticut statute was unconstitutional as applied, because "there was no allegation that Doehr was about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his real estate unavailable to satisfy a judgment." *Id.*, 115 L.Ed. 2d at 16. Reaffirming the requirement that only exigent circumstances can justify postponement of notice and an opportunity to be heard prior to "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail," the Court stated

> Yet there is no allegation that Doehr was about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his real estate unavailable to satisfy a judgment. Our cases have recognized such a properly supported claim would be an exigent circumstance permitting postponing any notice or hearing until after the attachment is effected. *See Mitchell, supra*, at 609, 40 L.Ed.2d 406, 94 S.Ct. 1895; *Fuentes, supra*, at 90-92, 32 L.Ed.2d 556, 92 S.Ct. 1983; *Sniadach*, 395 U.S., at 339, 23 L.Ed.2d 349, 89 S.Ct. 1820. Absent such allegations, however, the plaintiff's interest in attaching the property does not justify the burdening of Doehr's ownership rights without a hearing to determine the likelihood of recovery.

Id., 115 L.Ed.2d at 16-17. Finally, the Court concluded that

> the Connecticut provision before us, by failing to provide a preattachment hearing without at least requiring a showing of some exigent circumstances clearly falls short of the demands of due process.

Id., 115 L.Ed.2d at 18.

II. THE REQUIREMENT THAT ONLY EXIGENT CIRCUMSTANCES CAN JUSTIFY THE FAILURE TO PROVIDE PRESEIZURE NOTICE AND AN OPPORTUNITY TO BE HEARD APPLIES IN THE CONTEXT OF CIVIL *IN REM* FORFEITURE PROCEEDINGS.

This Court has previously held that due process does not require preseizure notice and an opportunity to be heard where the property seized was a yacht. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 677-80, 40 L.Ed.2d 452, 94 S.Ct. 2080. Reviewing the *Fuentes* criteria justifying seizure of property absent notice and an opportunity to be heard, the Court concluded that "in *these* circumstances we hold that this case presents an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process."[3] (emphasis added).

Specifically, the Court found that (1) seizure under the Puerto Rican statute served a significant governmental purpose by allowing Puerto Rico to assert *in rem* jurisdiction over the property, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions; (2) preseizure notice and hearing might frustrate the interests served by the statute, "since the property seized — as here, a yacht — will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed if advance warning

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[3] The Court's holding was expressly limited to the specific facts there presented:

> Since, however, our holding is that preseizure notice and hearing are not required by due process in the context of *this* forfeiture, we have no occasion to remand . . .

Calero-Toledo, supra, 416 U.S. at 677-78, fn. 12 (emphasis added).

of confiscation were given;" and (3) unlike the situation in *Fuentes*, the seizure was "not initiated by self-interested private parties." 416 U.S. at 679.

In seizures of real property, however, none of the three *Fuentes* criteria justifying seizure without notice and an opportunity to be heard exist. First, in the case of real property, there are less intrusive ways of asserting jurisdiction over the res, such as merely posting the property. *See, e.g., United States v. TWP 17 R 4, Certain Real Property in Maine*, 970 F.2d 984 (1st Cir. 1992).

Second, with real property, the "need for very prompt action" is rarely present.[4] Unlike personal property, such as currency or a yacht, real property is not movable, nor readily concealable. There is no danger that it will be removed from the court's jurisdiction or that it will be concealed from the court. Although there is always the possibility that improvements upon real property can be destroyed, the mere possibility, without more, cannot justify seizure without notice. In those rare cases where the government can present to a court specific, articulable facts that an owner will attempt to destroy real property if given advance warning of a seizure, such facts (if coupled with the other two *Fuentes* criteria) might constitute the "need for very

[4] At the time *Calero-Toledo* was decided, 21 U.S.C. §881 did not authorize the seizure or forfeiture of real property used or intended to be used to facilitate a violation of Title 21. 21 U.S.C §881(a)(7), making real property subject to seizure and forfeiture, was adopted in 1984.

[5] Given that Petitioner argues that the normal practice is to allow the owner of real property to remain in the premises even after the property has been seized, it is hard to understand how seizure without notice will prevent destruction of the property after such a seizure. Even in those instances where the government refuses to consent to an occupancy agreement and removes the owner from the property, nothing short of posting round the clock guards and placing barricades around the property can prevent a truly disgruntled owner from returning to the property and destroying it even after a seizure without notice. Thus, as a practical matter, seizure without notice offers little,

prompt action" justifying seizure without notice.[5] Similarly, if the government can establish that there are other exigent circumstances, such as ongoing drug trafficking, seizure without notice is constitutionally permissible. *See, e.g., United States v. 141st Street Corp.*, 911 F.2d 870 (2nd Cir. 1990), *cert. denied*, 111 S.Ct. 1017 (1991).

Further, Petitioner's argument that the "contents [of a residence] (which may also be subject to forfeiture if used in, or the proceeds of, a drug transaction) can be 'concealed'," Petitioner's Brief, pp. 29-30 is, at best, misleading. If the government has probable cause to believe that personal property located within a residence is subject to seizure and forfeiture, it must obtain a separate warrant to seize such property.[6] Once a warrant is obtained, however, such personal property may be seized without notice and an opportunity to be heard. *Calero-Toledo, supra.*

Finally, unlike the situation in *Calero-Toledo*, which involved the seizure of a yacht by Puerto Rican officials in May of 1972, it is now clear that the government is a "self-interested private part[y]" in civil forfeiture proceedings. Although not "private," law enforcement agencies are unquestionably self-interested. Under federal law enacted in 1984, forfeited assets no longer go into the general treasury. Instead, the property (or the money derived from its sale) is allocated exclusively for law

if any, protection against destruction of the property. Indeed, it may be more likely that damage to the property will occur as a result of forced entry by law enforcement officers.

[6] Although 21 U.S.C. §881(b)(4) purports to authorize the seizure of property without process when the attorney general "has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter," there is no "forfeiture seizure" exception to the Fourth Amendment's warrant requirement. It is elementary that Congress cannot authorize by legislation what the Constitution forbids. *Marbury v. Madison*, 5 U.S. 87 (1803). *United States v. LaSanta*, 978 F.2d 1300 (2nd Cir. 1992).

enforcement purposes. *See*, 28 U.S.C. §524. Thus, the government has a direct financial interest in the outcome of civil forfeiture actions.

That the government's pecuniary interest has been taken to heart by the Department of Justice is readily apparent from an August 1990 memorandum from the Attorney General, warning U.S. Attorneys that the Department was far short of its goal of $470 million in forfeiture deposits with only three months remaining in fiscal year 1990:

> "We must significantly increase production to reach our budget target . . . Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990."

Executive Office for U.S. Attorneys, U.S. Department of Justice, 38 U.S. Attorney's Bulletin, 180 (Aug. 15, 1990) (quoted in Gary M. Maveal, *The Unemployed Criminal Alternative in the Civil War of Drug Forfeitures*, American Criminal Law Review, Vol. 30:35, 49-50 (1992)).

More than one court has voiced concern over this conflict of interest inherent in forfeiture proceedings.

> "More and more courts are voicing frustration at what appears to be overreaching by the United States in the drug war, particularly in forfeiture cases where law enforcement agencies have a 'built-in' conflict of interest because they share in the product of the seizure.

United States v. That Certain Real Property Located at 632-636 Ninth Avenue, Calera, Alabama, 798 F. Supp. 1540 (N.D. Ala., 1992). *See also, United States v. All Assets of Statewide Auto Parts, Inc., etc.*, 971 F.2d 896, 905 (2nd Cir. 1992):

> "We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes. The district courts, in order to preserve some modicum of due process to criminal defendants [and civil forfeiture claimants] should be vigilant in approving seizures *ex parte* only upon a showing of exigent circumstances, and whenever possible should favor less drastic measures . . .

Id., 971 F.2d at 905.

The Court has traditionally recognized the need for special scrutiny where the government stands to benefit financially from the imposition of sanctions as a result of criminal conduct:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit. *See United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25-26, 52 L.Ed.2d 92, 97 S.Ct. 1505 (1977);*Perry v. United States*, 294 U.S. 330, 350-351, 79 L.Ed.2d 912, 56 S.Ct. 432, 95 ALR 1335 (1935).

Harmelin v. Michigan, 115 L.Ed 2d 836, 854, n.9 (1991) (Scalia, J. concurring); *See also, Ward v. Village of Monroeville*, 409 U.S. 57, 34 L.Ed.2d 267, 93 S.Ct. 80 (1972); *Tomey v. Ohio*, 273 U.S. 510, 71 L.Ed.2d 749, 47 S.Ct. 437 (1927). Given the government's direct and substantial pecuniary interest in civil forfeiture proceedings, a governmental seizure of property without notice or an opportunity to be heard warrants close

judicial scrutiny, and should be allowed only upon a clear showing of extraordinary circumstances.

III. THE OVERWHELMING MAJORITY OF COURTS TO HAVE CONSIDERED THE ISSUE HAVE HELD THAT DUE PROCESS REQUIRES NOTICE AND AN OPPORTUNITY TO BE HEARD PRIOR TO THE SEIZURE OF REAL PROPERTY.

The issue of whether due process requires notice and an opportunity to be heard prior to the seizure of real property in a civil *in rem* forfeiture has been squarely decided by the Second Circuit Court of Appeals. *United States v. Property at 4492 S. Livonia Rd.*, 889 F.2d 1258 (1989). In an incisive and well reasoned opinion, the court found that 21 U.S.C. §881 (a)(7) — the same statute under which the instant forfeiture was brought — implicated two basic constitutional principles. First, notice and an opportunity for hearing must generally precede the taking of an individual's property absent exigent circumstances. Second, an individual's expectation of privacy and freedom from governmental intrusion in the home merits special constitutional protection. See, *e.g. United States v. Karo*, 468 U.S. 705, 714, 82 L.Ed.2d 530, 104 S.Ct. 3296 (1984); *Payton v. New York*, 445 U.S. 573, 590, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980). Id., 889 F.2d at 1264.

The court then conducted an analysis of the three factors identified in *Mathews v. Eldridge, supra*, 424 U.S. at 335, to determine the constitutional adequacy of the preseizure *ex parte* procedure afforded the owner of the property.[7] The court concluded (1) that the owner's interest in the use and enjoyment of the home was substantial; (2) that although an ex parte probable cause determination before a neutral and detached magistrate reduces the possibility of an erroneous deprivation, preseizure notice and an opportunity to be heard would certainly further minimize that risk; and (3) the government's interest is the narrow one of seizing real property without notice and hearing, not the broader general interest in forfeiting property and enforcing the drug laws.

[7] The three factors identified in *Mathews* are:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge, supra*, 424 U.S. at 335.

Turning to the ultimate question of whether the due process balance favors the homeowner or the government where the property seized is a residence, the Second Circuit looked to whether there were exigent circumstances sufficient to warrant the postponement of notice and the opportunity for an adversarial hearing. In deciding that the balance favored the homeowner, the Court held that

> As a general matter, a showing of exigent circumstances seems unlikely when a person's home is at stake, since, unlike some forms of property, a home cannot be readily moved or dissipated. *Cf. United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555, 562 & n. 12, 103 S.Ct. 2005, 2011 n. 12, 76 L.Ed.2d 143 (1983) (seizure of currency); *Calero-Toledo*, 416 U.S. at 679, 94 S.Ct. at 2089 (seizure of pleasure yacht).

Livonia Road, 1889 F.2d at 1265. The court also noted that any exigency that might be posed by the threat of the owner placing an encumbrance on, or transferring, the property could be met by means less restrictive than seizure of the property without notice. Finally, the court noted that the government had waited at least six months after discovering the unlawful use of the property before instituting the forfeiture action, thus belying any claim of exigency.

The vast majority of courts to have considered this issue since the decision in *Livonia Road* have followed the Second Circuit's lead, holding that due process requires notice and an opportunity to be heard prior to the seizure of real property in the context of civil forfeiture proceedings. *See, e.g., United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896 (2nd Cir. 1992); *United States v. A Parcel of Land, Buildings, Appurtenances, and Improvements Known as 92 Buena Vista Avenue*, 937 F.2d 98, 101 (3rd Cir. 1991) (dicta), *aff'd on other grounds*, 507 U.S. ___, 122 L.Ed.2d 469, 113 S.Ct. 1126 (1992); *Richmond Tenants Organization, Inc. v. Kemp*, 956 F.2d 1300 (4th Cir. 1992) (forfeiture of tenant's leasehold interests); *United States v. Certain Real Property Located at Hanson Brook, Town House Road, etc.*, 770 F.Supp. 722 (D. Me. 1991); *United States v. Two Parcels of Property Located at 185 and 191 Whalley Avenue, New Haven, Conn.*, 774 F.Supp. 87 (D.Conn. 1991); *United States v. Property at 850 S. Maple, Ann Arbor, Mich.*, 743 F.Supp. 505 (E.D. Mich. 1990); *United States v. Parcel 1, Beginning at Stake*, 731 F.Supp. 1348 (S.D. Ill. 1990); *United States v. 14128 South School Street, Riverdale, Illinois, et, al.*, 774 F.Supp. 475 (N.D. Ill. 1991); *United States v. 8215 Reese Road, Harvard, Illinois*, 803 F.Supp. 175 (N.D. Ill. 1992); *United States v. That Certain Real Property Located at 632-636 Ninth Avenue, Calera, Alabama*, 798 F.Supp. 1540 ((N.D. Ala. 1992); *Department of Law Enforcement v. Real Property*, 588 So.2d 957 (Fla. 1991). *See also, Application of Kingsley*, 802 F.2d 571 (1st Cir. 1986), decided prior to *Livonia Road*.

Those few courts which have held that due process does not require notice and opportunity to be heard prior to the seizure of real property in the context of a civil forfeiture proceeding have failed to engage in any analysis or discussion of the governmental and private interests involved (the *Mathews* factors), or failed to consider the significant differences between real property and personal property. *See, e.g. United States v.*

A Single Family Residence & Real Property Located at 900 Rio Vista Blvd., 803 F.2d 625, (11th Cir. 1986); *United States v. Certain Real Estate Property Located at 4880 S.E. Dixie Highway*, 838 F.2d 1558 (11th Cir. 1988).

IV. UNDER THE THREE PRONG TEST ANNOUNCED IN *MATHEWS V. ELDRIDGE*, THE GOVERNMENT'S INTEREST IN SEIZING REAL PROPERTY WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD IS OUTWEIGHED BY THE PROPERTY OWNER'S NEED FOR A PRESEIZURE ADVERSARIAL HEARING.

As noted above, this Court's previous holdings clearly and unmistakably demonstrate that the presence or absence of exigent circumstances remains a crucial factor in determining the constitutionality of *ex parte* procedures. When exigent circumstances are absent, as they were in the case at bar, and as is typical in the context of civil forfeiture actions involving real property, the government's interest in seizing property must give way to the owner's superior interest in the property. An analysis under the three prong *Mathews* inquiry is thus appropriate.

1. The Property Owner's Interest.

Under this prong, the court must evaluate the owner's interest in protecting real property from being seized. This interest is clearly significant. This Court has previously held that a similar interest in protecting houses from prejudgment attachment was "significant," concluding that it was subject to the strictures of due process. *Doehr*, 115 L.Ed.2d at 14. Moreover, when property rights are at issue, so too are liberty rights. As Justice Stewart wrote for this Court:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy proper-

> ty without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the property in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without he other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552, 31 L.Ed.2d 424, 92 S.Ct. 1113 (1972).

Although the government argues that "the only real change wrought by the typical seizure is that the owner's continued occupancy is subject to an agreement that recognizes the United States' interests in protecting its claim to the property . . .", Petitioner's Brief, p. 32, such seizures clearly restrict the owner from alienating or encumbering the property.[8]

> [T]he property interests that attachment affects are significant. For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause.

Doehr, 115 L.Ed.2d at 14. Like the State in *Doehr*, Petitioner argues that seizures do not typically amount to complete, physical or permanent deprivation of real property. However,

[8] That the government may enter into an occupancy agreement with the owner of the property does not undo the constitutional harm, since the government "allow[s] such continued occupancy as a matter of grace, not entitlement." *Livonia Road*, 889 F.2d at 1265.

> [T]he Court has never held that only such extreme deprivations trigger due process concerns. *See Buchanan v. Warley*, 245 U.S. 60, 74, 62 L.Ed. 149, 38 S.Ct. 16 (1917). To the contrary, our cases show the temporary or partial impairment to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection.

Doehr, 115 L.Ed.2d at 14.

Similarly, occupancy agreements restrict the owner's use of the property, and require waiver of constitutional rights by providing for governmental entry and inspections.

2. The Risk of Erroneous Deprivation.

This Court has emphasized that, especially where a party has a pecuniary interest in the outcome, "making realistic assessments" of the merits of a case based on *ex parte* showings is difficult because these showings can be "one-sided, self-serving, and conclusionary." *Doehr*, 115 L.Ed.2d at 15. The Court noted:

> The likelihood of error that results illustrates that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . [And n]o better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-72, 95 L.Ed.2d 817, 71 S.Ct. 624, 647-649 (1951) (Frankfurter, J., concurring).

Doehr, 115 L.Ed.2d at 15-16. The fact that property owners are ultimately entitled to a trial on the merits *after* the seizure does not materially reduce the risk of erroneous deprivation.[9] Fur-

[9] See, *e.g.*, *United States v. Real Property Located at 110 Collier Drive*, 793 F.Supp. 1048 (N.D. Ala. 1992):

thermore, a trial on the merits, which is the only hearing following the seizure authorized by statute, may not take place for many months, or even years, after the seizure. Property owners are subject to crowded civil calendars, and the government may, at its option, obtain a stay of the forfeiture proceeding upon the filing of an indictment or information in a related criminal proceeding. *See*, 21 U.S.C. §881(i). Even if it is later determined that probable cause did not actually exist, such a post seizure finding "would not cure the temporary deprivation that an earlier hearing might have prevented." *Doehr*, 115 L.Ed.2d at 16. Thus, the *ex parte* procedures create a considerable risk that real property will be erroneously seized.

3. The Governmental Interest.

The governmental interest to be considered is the government's interest in seizing real property without notice, not the government's interest in forfeiting property. The government's interest in seizing real property to deter illegal drug use would not be affected by requiring an adversarial hearing prior to the seizure. With an adversarial hearing, the government would still be able to initiate forfeiture proceedings, to provide a significant deterrent to drug trafficking, and to enhance revenue for law enforcement, while at the same time protecting the property owner from an erroneous deprivation of property rights.

Finally, the government has framed its interest in *ex parte* seizures as one placing the owner on notice of the government's "interest in protecting its claim to the property." Petitioner's

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> The United States has visited an injustice on Julie Moon [the property owner] and it has misled this court into the role of an unwitting participant . . . The Court shares some of the blame for this travesty of justice. It should have more closely examined the affidavits of the state law enforcement officials whose agencies stand to gain financially as a result of the forfeiture.

Id., at 1052.

Brief, at 32. With real property, this narrow governmental interest can be satisfied simply by commencing the forfeiture action. Thus, neither physical occupancy by the government, nor the coerced imposition of an occupancy agreement is necessary to preserve the government's interest.

The balancing of the *Mathews* factors in this context is straightforward. Absent exigent circumstances, the government's interest in seizing real property without notice and an opportunity for the owner to be heard is simply not more compelling than the property owner's interest in participating in a preseizure adversarial hearing.

CONCLUSION

For the foregoing reasons, the NACDL as amicus curiae respectfully urges this Court to affirm the decision of the Ninth Circuit Court of Appeals holding that due process requires notice and an opportunity to be heard prior to the seizure of real property in a civil forfeiture proceeding.

Respectfully submitted,

Richard J. Troberman*
E. E. Edwards, III
1301 Fifth Avenue, Suite 3500
Seattle, Washington 98101-2650
(206) 343-1111

* Counsel of Record for
Amicus Curiae
National Association of
Criminal Defense Lawyers

June 14, 1993

No. 92-1180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,

Petitioner,

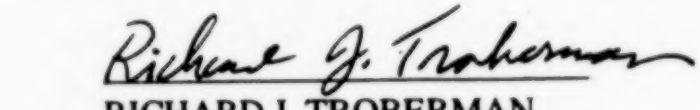
v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.,

Respondent.

CERTIFICATE OF SERVICE

It is hereby certified that both parties to this case have been served three copies of the Brief of Amicus National Association of Criminal Defense Lawyers in Support of Respondent by mail on June 14, 1993.



RICHARD J. TROBERMAN
Counsel of Record for
Amicus Curiae
National Association of
Criminal Defense Lawyers

William C. Bryson
Acting Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Christopher J. Yuen
Attorney at Law
101 Aupuni Street, Suite 108
Hilo, Hawaii 96720